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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1249

SAMUEL LEHRER,

Petitioner,

vs.

THOMAS NICKOLOPULOS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

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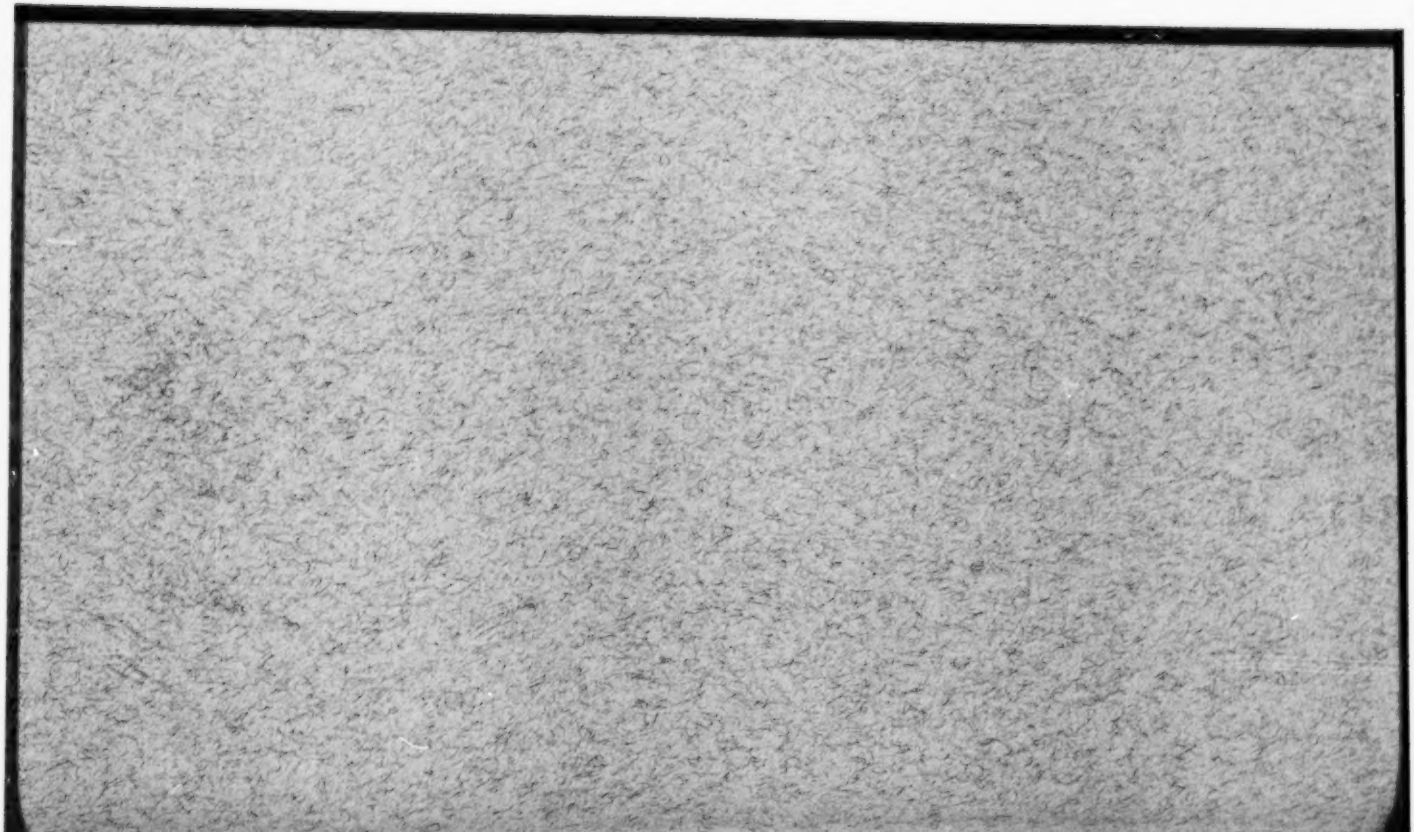
Counsel for Petitioner.



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PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Samuel Lehrer respectfully shows:

A

Summary Statement of the Matter Involved

This is an application for a Writ of Certiorari to the New Jersey Court of Errors and Appeals to review a judgment affirming a judgment of the New Jersey Supreme Court. The remittitur in the New Jersey Court of Errors and Appeals affirming the said judgment was filed with the said New Jersey Court of Errors and Appeals, January 25,

1945. It was retained in said Court until February 9, 1945, when it was sent down to the Supreme Court and there filed. This practice follows rules 42 and 43 of the Rules of the New Jersey Court of Errors and Appeals (R. 41). The judgment review of which is sought here, thus became final on February 9, 1945.

Petitioner, as defendant, was sued in the New Jersey Supreme Court for the alleged breach of his covenant to pay rent under two leases (R. 4-14; 15-16). There is a purpose clause set forth in both leases, the language of which is as follows: "to be used and occupied as a store and show room for the purpose of disposing of, selling, vending and displaying automobiles, radios, refrigerators, washing machines and other electrical appliances and equipment (R. 4 & 15). Prior to December 1, 1942, the petitioner herein moved. On October 1, 1943, a rental deficiency of $2530.00 was charged against him. He was credited with $775.00 paid by another tenant and the net amount in suit became $1755.00 (R. 3).

Petitioner, as defendant in said suit, vigorously defended said suit. He pleaded in this answer that the Government of the United States of America evicted him by virtue of the fact that as a part of its War Policy, under and pursuant to and by virtue of Acts of Congress in that behalf, had and obtained the said Government promulgated orders prohibiting the production and sale of the articles set forth in the leases and that on or about December 1, 1942, the petitioner surrendered the premises to the landlord and his lease was terminated because of the action of the United States Government as above set forth (R. 19).

Petitioner in his answer also squarely set forth and contended that the orders of the said United States Government rendered performance of his undertakings impossible, that the purpose for which the said leases were executed

had been completely frustrated and the said leases, and each of them were terminated (R. 20).

Petitioner's answer was stricken (R. 28), judgment was entered against him (R. 31) and petitioner appealed (R. 33).

The New Jersey Court of Errors and Appeals was clearly confronted with the question of whether or not a Trial Court as a preliminary question of law or a jury under proper instructions from a court should be called upon to determine whether or not the promulgation of the orders in question and their enforcement might under certain circumstances depending upon local conditions and conditions in the industry, or trade in question, permit a lessee to say that there was a condition implied in law at the time of the making of the lease, that happenings of this kind would not take place during the term of the lease and if they did, the contract, though partly performed, was voidable as to the balance by the tenant, as this petitioner, and he was absolved from paying the rest of the rent if he moved and handed back the premises in good condition.

Petitioner further states that the Court below missed this question entirely although it was clearly put before the Court in the answers which the defendant filed. The New Jersey Court of Errors and Appeals also failed to deal with this question, although in the opinion of Judge Thompson, writing for the New Jersey Court of Errors and Appeals, the fact that there was a Federal question was recognized by him as was the fact that it had been raised in the Court of first instance (R. 38). That the New Jersey Court of Errors and Appeals was appreciative of the fact that your petitioner raised a serious Federal question is indicated in its opinion at the foot of page 38 and at the top of page 39 of the case, but it went far beyond the field of the record which it had before it when in the paragraph at the foot of page 39, it concluded that the Lower Court

was justified in striking the defense. The Lower Court by taking Judicial notice of the Government's orders as well as the Upper Court could not reach a sound conclusion without going further and taking proof as to the conditions in the industry in question brought about by the promulgation of the orders. Petitioner does not contend here and did not contend in the Courts below that the acts of Congress creating a War Regulation Board were unconstitutional. Neither did the petitioner contend below nor does he contend here that executive orders promulgated by the War Regulations Board are unconstitutional. Petitioner is a loyal citizen of the United States and is in favor of whatever this Government decides is best for its citizens collectively. Petitioner does, however, contend that both the Court below and the New Jersey Court of Errors and Appeals misconceived the right of a trial judge to determine the effect of these Federal orders without a hearing.

B

Jurisdiction

1. The date when the judgment of the New Jersey Court of Errors and Appeals, review of which is sought here became effective, February 9, 1945.

2. The jurisdiction of this Court to issue the Writ of Certiorari herein prayed for is invoked under 28 U. S. C., Section 344 (b) Judicial Code, Section 237 (b). There is claimed here on behalf of the petitioner, an immunity under the statutes of the United States and his Federal claim has been denied both in the Lower Court and in the Court of Review.

3. The jurisdiction of this Court to issue the Writ is also invoked under Rule 38 of the Court, especially paragraph 5, sub-section (a).

C

The Question Presented

This case presents the following single question and it is the only question in the case:

Under the acts of Congress establishing the War Production Board and under the rules promulgated by said Board, if there is a single automobile in the United States of America which can be bought and sold and if there are refrigerators, radios and electrical equipment in any City or State in the United States, may the Court as here, strike an answer, or must the court after hearing, with or without the aid of a jury determine whether or not the stricture on the ordinary economic flow set into motion by lawful constituted Federal authority absolves a defendant as the petitioner here from his obligation to pay the remaining rent due under his lease?

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out under the seal of this Honorable Court directed to the New Jersey Court of Errors and Appeals commanding that Court to certify and send to this Court for its review and examination on a day certain to be therein named, a transcript of the record and proceedings herein; that the judgment of the New Jersey Court of Errors and Appeals be reversed by this Honorable Court; and that your petitioner have such other and further relief in the premise as to this Honorable Court may seem just and meet.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1249

SAMUEL LEHRER,
Defendant-Petitioner,

vs.

THOMAS NICKOLOPULOS,
Plaintiff-Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. Opinions of the Court Below

The decision of the New Jersey Supreme Court is an unreported decision, but the opinion of the Court is set forth in the State of the Case, at page 29.

The opinion of the New Jersey Court of Errors and Appeals is set forth on page 37 of the State of the Case.

2. Statement of the Case

A full statement of the case has heretofore been given under the heading "A" in the petition for the Writ. No useful purpose can be accomplished in repeating said statement in this brief.

3. Specification of Errors

The specification of errors is substantially the same as the reason of the petition for the allowance of the Writ set forth in the petition and may be condensed as follows:

1. The New Jersey Supreme Court by its judgment striking the answer of the defendant, failed to take into consideration the defense set forth in the answer charging that the orders promulgated by the War Production Board frustrated petitioners leases and caused a stricture in his business, not contemplated by the parties at the time that the leases were made.

2. The New Jersey Court of Errors and Appeals failed to find petitioner's lawful right to go to hearing on the question of whether or not, the regulations and rules promulgated by a Federal Governmental Agency terminated his lease.

ARGUMENT

Point One

The Courts Below Erred in not giving and according to the petitioner here (defendant below), his right to have a full hearing on the effect on his lease of duly promulgated Federal regulations.

The New Jersey Court of Errors and Appeals, although clearly recognizing the fact that a Federal question was presented by the answer filed by the petitioner, here as defendant, in the Court below, sidetracked the real issue involved. Judge Thompson writing for the New Jersey Court of Errors and Appeals says (p. 39). "But, in the present case the defendant pleaded the issuance of Government orders "prohibiting the production and sale of the articles set forth in the leases," as a consequence of which

he had been evicted and performance of his contract of lease rendered impossible. The precise orders upon which defendant relied as having accomplished his business ruin was not cited or particularized, but the court, taking judicial notice of such Government orders as did exist having relation to the class of merchandise in question, decided that they did not go to the extent of prohibiting the sale of automobiles, radios, refrigerators, washing machines and other electrical appliances and equipment.

(fol. 40) The court was empowered to take judicial notice of the federal orders in question and of their contents and extent (1) because they were matters of common knowledge through their wide effect on the ordinary life, habits and usages of the general public, and (2) by force of the statute of this State, R. S. 2: 98-28 to 98-30. Furthermore, mere impairment of the beneficial use is not in itself sufficient to warrant termination of lease at the will of the tenant."

Was it not the intent of the Federal Government when setting up the War Production Board and allowing it to promulgate rules and regulations to do so with a minimum amount of discomfiture to the citizens of the Country at large?

We are all agreed that the War effort comes first regardless of political creed. We have had adequate reason to suppose that the pronouncement of our late lamented President placing the needs of the Nation above the needs of any individual, is a method of substantiating the War effort and is the only technique to follow, but this becomes sound law, only because of the Nation's right to preserve its very existence. It does not follow that the chips must fall where they may and it does not follow that a Court by invoking the doctrine of judicial notice can conclude that because there may be two hundred automobiles, one hundred radios, fifty refrigerators and five washing machines in the Country, that the lease in question must be sustained

and the tenant be held to acount for his rent. We do not urge here that the Government as a corollary to creating a war policy must at the same time establish an economical flow of commodities which will enable tenant to stay in the business; what we do contend, is that in each case where the precise question herein involved is raised, the Court must allow a record to be established from which it determines as a preliminary question of law, or a jury determines as a factual question in the case and an Appellate Court may have an opportunity, if called upon to set aside a gross abuse of discretion as to how the particular lease and the particular tenancy were affected by inability to procure and trade in the commodities in question. Both the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals fall into error by not seeing that this is the real situation.

In the State of New York, a different situation seems to obtain. In the case of *Schantz* v. *American Auto Supply Co., Inc.*, 178 Misc. 909, 36 N. Y. S. 2d, 747, the Court refused to strike an answer similar to the one which we filed, and the Court in its decision stated that in an action for rent, under a lease of premises to be used for the sale of enumerated articles, an answer alleging that the tenant had been evicted from the premises by Government order prohibiting the sale of the articles means that the tenant had surrendered the premises and elected to terminate the lease because of the Government's action and stated enough to require any lack of explicitness to be resolved in favor of the pleading. In that case, where the demised premises were to be used for the sale of tires, radios, washing machines, and refrigerators an affirmative defense alleging that the sale of the articles had been prohibited by the United States Government and that as a result of the action of the said Government the defendant was evicted from the premises, was held to be a sufficient answer. As

was said in *Signal Land Corp.* v. *Loescher*, 35 N. Y. S. 2d, P. 25: "Such a Governmental action or decree destroys the subject matter of the contract and makes performance thereof impossible and hereby terminates the lease." In that case it was also held that where the premises were leased for the purpose of carrying on therein the business of selling and installing oil burners, the issuance by the Federal Office of Production Management of priority orders preventing the tenant from carrying on such business rendered his performance of the lease impossible and constituted a good defense to the landlord's action for rent and action for breach of the lease.

In the case of *Port Chester Central Corporation* v. *Leiberts*, 39 N. Y. S. 2d, page 41, decided January 19, 1943, the Court held on a motion to strike an answer that Governmental regulations effected a diminution in the volume of defendant's business, but whether or not this diminution reached such an extent as to result in a frustration in the purposes of the lease cannot be determined solely on the basis of affidavits. The motion to strike the answer was denied.

There is no point in the Court's suggestion that the Government has not done this to these specific premises, but generally. Obviously, we are only concerned with these specific premises. The defense only goes to what happened in these specific premises and the allegations in paragraphs 2 and 3 of the first separate defense are certainly broad enough to cover the premises set forth in the lease. Furthermore, while the Court may take judicial notice of the extent of the Government's action, the Court did not have before it in any of the pleadings the precise orders and regulations which the defendant-appellant relies upon, and the Court furthermore reaches its conclusion without giving the slightest degree of thought as to whether or not there was a condition implied in law that if, as a result of

the Governmental orders, the supply of the commodities in question was so limited that the qualifications of the persons who were entitled to buy were so limited as to amount to a substantial frustration, that then and in that event, the leases were to be terminated. In the case of *Canrock Realty Corporation* v. *Vim Electric Company*, decided August 29, 1942 and reported in 37 N. Y. S. 2d, page 139, the plaintiff brought an action for an installment of rent due under a lease. The defense was that Government regulations have prohibited the defendant from selling radios, radio equipment, electrical equipment, refrigerators, etc., and that by reason thereof it has been deprived of its beneficial rights under the lease. The Court in its opinion stated that it was conceded that there was no Governmental prohibition against the sale of the articles referred to, but that the Government, by its rules, has either prohibited or limited the manufacture of the articles, with the result that the defendant was unable to stock these articles in its warehouse prior to the Governmental limitation on manufacture. The lease contained the following purpose clause.

> "The tenant shall use and occupy the demised premises as a retail store for the sale of radios, radio apparatus, radio repairs, television and apparatus, musical instruments, photographs and records, electrical supplies and appliances, washing machines, refrigerators, toys cameras, oil burners, gas stoves, electric ranges, sporting goods, sportswear, and sporting apparel of every kind, nature, and description and for no other purpose."

Said the Court at page 140:

> "There wouldn't be much doubt that the defendant would be permitted to terminate the lease had the sole purpose for which the premises were leased been for instance the sale of a new automobile which the Government has proscribed or the sale of washing ma-

chines, refrigerators, electric ranges, etc., which the Government has forbidden to be manufactured."

and further on:

"There is conflict of authority in various states in this country upon the question of law here presented, but the weight of authority seems to be to the effect that if a Governmental act or decree destroys the subject matter of the contract and makes performance impossible that that thereby terminates the lease. The parties to the lease are presumed to have contracted with a view to the law as it existed at the time the lease was made.

To hold them bound to anticipate future legislation would be the equivalent to making them obligate themselves to the performance of conditions prescribed by others, which in the nature of things could not have been within the contemplation of the parties at the time the contract was made.

If the tenant is deprived by Governmental regulations of the beneficial use of the property so that it prevents him from using it for the primary and principal use for which it was rented the lease is terminated although other incidental uses might still be made of it."

Again at page 141:

"The question here is have the Government regulations prevented the tenant from using the premises for the primary purpose for which he leased it and in my opinion that presents a question of fact which cannot be resolved on the motion for summary judgment. The defendant says he cannot obtain merchandise for sale by reason of the Government restrictions. The Plaintiff says this is not so because its other stores are stocked with the very articles which it says it cannot obtain. Again the defendant says that over 90% of its business consisted in the merchandising of articles which the Government will no longer permit to be

manufactured, as a result of which it cannot obtain them for sale. This likewise plaintiff denies.

Defendant is entitled to his day in Court for an opportunity to prove that the primary and principal purpose for which he leased the premises has been destroyed by reason of Governmental regulations. If that is so, then the defendant can rightfully terminate the lease."

POINT TWO

The Courts Below failed to consider the economic and legal effect of the functioning of the War Emergency Boards, coming into being, since the making of petitioner's lease.

At the time of the making of the leases, the functioning of the War Emergency Board and similar Federal administrative bureaus was not and could not have been within the contemplation of the parties. Where the manufacture of an article has been prohibited, the sale of the article naturally does not follow as a consequence, as where there is no manufacture there is no sale. Of course, at the time that the order freezing manufacture is made there may still be a limited supply of used articles on hand, but where the sale of these is limited to persons holding qualifying certificates which must be procured from Governmental authority and after hearings before administrative boards, it is a fair question whether or not this is not a complete frustration. If it is not a complete frustration, may it not be a sufficiently adequate frustration so that in law it may truthfully be said that the parties had no such situation in mind when the leases were made. If they did not have such a situation in mind, who is going to say and under what circumstances will enough be said to relieve a tenant from his presumptive obligation under the lease? Will a Court do this alone by examining pleadings which squarely put this issue before it? Will the Court do this without asking what orders o

regulations he relies upon? Will a Court do this without sworn testimony before it, showing the effect on the premises in question of the orders? Suppose that at the time the general sale of new automobiles is prohibited there are a million of them in the country, half a million of them being in California and twenty of them being in New Jersey. Is the Court going to take testimony and inquire as to how these orders affected this particular lease and sales at this particular location, or is it going to brush all of this off, *although for the purposes of this motion the allegations in our answer state that our leases were terminated because of the Governmental regulations and orders?* The New York Courts refuse to move even on affidavits. The New York Courts will not enter summary judgment in a case of this kind without a full hearing before the Court. Questions of fact belong to the jury in this type of case, as in any other case. The time for the Court to pass upon the law of the situation is after it has heard all of the facts and has had the orders and the precise regulations affecting the situation clearly before it.

Conclusion

The issues raised in this cause and incorrectly decided below, present a legal problem arising in our day which clearly requires clarification in this Court.

We, therefore, respectfully urge that a Writ of Certiorari be granted in this case to review and correct the judgment of the New Jersey Court of Errors and Appeals.

Respectfully submitted,

JOSEPH STEINER,
Of Counsel with Petitioner.

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JUN 4 1945
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Supreme Court of the United States

OCTOBER TERM, 1944.

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SAMUEL LEHRER,
Petitioner.

vs.

THOMAS NICKOLOPULOS,
Respondent.

BRIEF OF RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1249.

SAMUEL LEHRER,
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BRIEF OF RESPONDENT.

I.

Opinions of Courts Below.

The opinion of the New Jersey Court of Errors and Appeals (Tr. pp. 37-40) is reported in 132 N. J. L. 461, and 40 Atl. Rep. (2d) 794. The opinion of the New Jersey Supreme Court (Tr. pp. 29-31) is not reported, officially or unofficially.

II.

Jurisdiction.

Respondent asserts that this Court lacks jurisdiction to entertain the petition for a Writ of Certiorari, or, if

such jurisdiction exists, that it ought not to be exercised, for the following reasons:

A. The petition was not filed within the time limited by the statute, 28 United States Code, Sec. 350;

B. The record discloses that there was decided no federal question of substance not heretofore determined by this Court or probably not in accordance with applicable decisions of this Court, as required by paragraph 5a of Rule 38 of this Court.

III.

Statement of the Case.

The statement of the case contained in the Petition for Writ of Certiorari contains all pertinent facts, and will not be repeated here. However, respondent does not adopt and, in fact, denies so much of that statement as claims that a Federal question was at all involved or that the New Jersey Court of Errors and Appeals "missed" that question.

IV.

ARGUMENT.

POINT A.

The petition for writ of certiorari was not filed within the time limited.

By the statute, 28 U. S. C. Sec. 350, no writ of certiorari intended to bring any judgment or decree before the Supreme Court shall be allowed unless application therefor

be duly made within three months after the entry of such judgment or decree.

The instant application is for a writ to review a cause wherein a final judgment has been rendered or passed by the highest court of the State of New Jersey in which a decision could be had, under Section 237 of the Judicial Code (28 U. S. C. sec. 344(b)).

The cause was decided by the New Jersey Court of Errors and Appeals on January 19, 1945 (Tr. p. 37; p. 41). An "Order on Affirmance of Judgment", containing a remittitur, was filed in that Court on January 25, 1945, and it "adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed * * *" (Tr. p. 41). The order on affirmance and remittitur was filed in the lower court on February 9, 1945 (Tr. p. 41). The petition for Writ of Certiorari was filed in this Court on May 9, 1945.

Since the purpose of the application is to review a final judgment of a State court, and since the statute requires application to be made within three months after the entry of the judgment, the issue to be determined under this point is when the judgment below became a final judgment.

The test is not whether, or when, the judgment is denominated final under local rules of practice, but, rather, whether and when the order below fully adjudicated the rights of the parties, without further review being available.

Department of Banking v. *Pink*, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254.

Retention of the record for ten days after entry of the remittitur under Rule 43 of the Rules of the New Jersey Court of Errors and Appeals does not affect the finality of the judgment. That is entered and becomes final in the appellate court, certainly not later than upon entry of the remittitur in the appellate court. This is recognized by Rule 42 of the Rules of the New Jersey Court of Errors and Appeals, which provides, in part, that:

> "* * * The remittitur in case of an appeal shall contain a copy of the decree, order or judgment of this court * * *"

It follows that there was a final judgment entered in the New Jersey Court of Errors and Appeals upon the filing of the order and remittitur in that court. That occurred here on January 25, 1945, so that the time limit expired on April 25, 1945. Finality of the judgment did not await the filing of the remittitur in the New Jersey Supreme Court. The petition is, therefore, too late.

> *Wurts* v. *Hoagland*, 105 U. S. 701, 26 L. Ed. 1109;
> *Department of Banking* v. *Pink*, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254;
> *Cole* v. *Violette*, 319 U. S. 581, 63 S. Ct. 1204, 87 L. Ed. 1599.

The *Wurts* case deals specifically with the finality of a judgment of the New Jersey Court of Errors and Appeals.

POINT B.

The judgment below involved no federal question of substance not heretofore determined by this court, or determined probably not in accordance with applicable decisions of this Court.

The suit below was for the balance of unpaid rent under two leases. The defense was that the leases provided that the premises were to be used for the purpose of disposing of, selling, vending and displaying automobiles, radios, refrigerators, washing machines, and other electrical appliances and equipment; that by virtue of orders promulgated by the Federal Government "prohibiting the production and sale of the articles set forth in the leases", (Tr. p. 19) the defendant was "evicted", and he vacated the premises prior to December 1, 1942.

Respondent, plaintiff below, moved to strike out the answer (Tr. pp. 26-27). In ruling on the motion, the court necessarily considered the provisions of the orders relied on by way of defense. Consideration of these provisions, which have the force of law, and application thereof to the lease obligation, was a question for the court only, and could not have been submitted to a jury. This was by virtue of N. J. P. L. 1941, Ch. 81, p. 193, ff., as amended by N. J. P. L. 1942, Ch. 104, p. 365 (N. J. S. A. 2:98-28 to 2:98-34, pocket part), which provides that the New Jersey courts shall judicially notice the law of other jurisdictions and that the determination of such law shall be by the court and not a jury.

Judicial notice of the orders was also proper because of the fact of common knowledge thereof, and because of the provisions of the Act of July 26, 1935, Sec. 7 (49 St. 502, 44 U. S. C. Sec. 307, pocket part), which enacted that:

> "The contents of the Federal Register shall be judicially noticed, and, without prejudice to any other mode of citation, may be cited by volume and page number."

Having examined the orders relied on, the court concluded that no order prohibited the use of leased real estate for the enumerated purposes; and, further, that those orders did not go to the extent pleaded as a defense; i. e., they did not prohibit the sale of the enumerated articles (Tr., pp. 30, 39).

The applicable principle of law is the familiar one that where the continuance of the subject matter of a contract is a condition thereof, express or implied, destruction thereof renders performance impossible and absolves the parties from further liability. The principle does not apply, however, where performance is not practically cut off, but only is rendered more difficult or costly.

> *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, at 630; 41 S. Ct. 612, at 615; 65 L. Ed. 1123.

The propriety of striking out the defense is supported by the decision of this Court in *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 669, where the District Court was affirmed in striking out a bill of complaint seeking to enjoin enforcement of an obligation to operate street railways at specified rates on the

ground of impossibility of performance because of an order of the National War Labor Board raising the wages of employees and thereby making the fixed rates grossly inadequate. It was pointed out that the order had not made performance impossible, though it may have rendered it more difficult or costly. There, as here, the pleading was stricken out on motion, for it was apparent that, taking the facts in their most favorable light, there was no legal excuse for failure to perform.

Respondent has no desire to refer to authorities of the State of New York, but since petitioner's only cited cases are from that State, it is pointed out that those cases were in the New York lower courts. Decisions in the Appellate Division are to the contrary, and support the correctness of an order striking an answer and entering summary judgment in cases involving the same Federal orders here relied on.

Byrnes v. *Balcom,* 265 App. Div. 268, 38 N. Y. S. (2d) 801;
Colonial Operating Corp. v. *Hannan Sales & Service,* 265 App. Div. 411, 39 N. Y. S. (2d) 217.

Finally, it is suggested that the sole issue involved and passed upon was whether the matter raised by the answer was a defense in law to an action for rent due under an agreement of lease made in New Jersey, between residents of New Jersey, and relating to real estate there situate, and that this was an issue to be determined solely according to the law of New Jersey, pursuant to the principles of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. There was no Federal question. The validity

of the governmental orders was not involved, nor was there any colorable claim that they purported to deal directly with the subject of the action. They were pertinent only insofar as it was necessary to examine them to determine if they went so far as to prohibit the sale of the enumerated articles, thereby making the permitted use of the leased premises no longer possible.

Conclusion.

The prayer of the petition should be denied; first, because it was filed beyond the period permitted, and second, because it is clear from the record that there is involved no Federal question of substance not heretofore decided by this Court, and that no Federal question is shown to have been decided probably not in accordance with applicable decisions of this court.

Respectfully submitted,

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